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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/664,101

09/17/2003

Beata Bartkowska

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EXAMINER

BEKKER, KELLY JO

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

05/05/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/664,101

Applicant(s)

BARTKOWSKA ET AL.

Examiner

Kelly Bekker

Art Unit

1794

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period **will** apply and **will** expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply **will**, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 27 January 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-5,20,21 and 23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5,20,21 and 23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 1/29/09.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date: \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION**

Amendments made 1/27/09 have been entered.  
Claims 1-5, 20, 21 and 23 remain pending.

***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-5, 21 and 23 are rejected under 35 U.S.C. 102(a) as being anticipated by Koss (WO 02/094035 A1). The references and rejection are incorporated herein and as cited in the office action mailed October 30, 2008.

Specifically regarding the newly added limitations to claim 1, the claim limitations were previously recited in claim 21 and thus the new limitations of claim 1 are rejected for the same reasons claim 21 was previously rejected.

Newly added claim 23 recited claim limitations that are substantially the same as claim 1 and thus claim 23 is rejected for the same reasons of record that claim 1 was previously rejected. Specifically regarding the limitation of claim 23, wherein the frozen product is produced by adjusting the pH of the fruit puree to a value above the isoelectric point of any protein to be incorporated in the product, followed by producing a premix comprising fat, non-fat milk solids, sweetener, and about 5-80% of the fruit puree, and then homogenizing and pasteurizing the premix, Koss teaches that a premix containing water, fat, nonfat milk solids, and sweetener is homogenized, pasteurized, cooled and then combined with a fruit puree containing fiber (page 4 lines 13-16, page 10 line 20 through page 11 line 3, page 23 lines 6-10, page 24 lines 1-32 and page 25 lines 5-21). Applicant is reminded that "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) In the instant case, since applicant claims (claim 1) and discloses in the specification that the same product can be made by more than one method, one

of which is the method taught by Koss, wherein a premix comprising water, fat, non fat milk solids and sweetener is homogenized and pasteurized, cooled, and then mixed with a fruit puree, the instantly claimed product recited in claim 23 which is made by adjusting the pH of the fruit puree to a value above the isoelectric point of any protein to be incorporated in the product, followed by producing a premix comprising fat, non-fat milk solids, sweetener, and about 5-80% of the fruit puree, and then homogenizing and pasteurizing the premix would be the same as the product taught by Koss.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim 20 is rejected under 35 U.S.C. 103(a) as Koss (WO 02/094035 A1) in view of Brake et al. (US 6432466 B2). The references and rejection are incorporated herein and as cited in the office action mailed October 30, 2008.

Claims 1-5, 20, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brake (US 6432466) in view of the combination of Jonas (US 4971824) and Arbuckle (Ice Cream, 2<sup>nd</sup> Edition 1972, page 96). The references and rejection are incorporated herein and as cited in the office action mailed October 30, 2008.

Specifically regarding the newly added limitations to claim 1, the claim limitations were previously recited in claim 21 and thus the new limitations of claim 1 are rejected for the same reasons claim 21 was previously rejected.

Newly added claim 23 recited claim limitations that are substantially the same as claim 1 and thus claim 23 is rejected for the same reasons of record that claim 1 was previously rejected. Specifically regarding the limitation of claim 23, wherein the frozen product is produced by adjusting the pH of the fruit puree to a value above the isoelectric point of any protein to be incorporated in the product, followed by producing a premix comprising fat, non-fat milk solids, sweetener, and about 5-80% of the fruit puree, and then homogenizing and pasteurizing the premix, Brake teaches that a

premix containing water, fat, milks solids non fat, and sweetener are homogenized and pasteurized, held while allowed to cool, and then added to a fruit puree (Column 4 line 66 through Column 5 line 18). Applicant is reminded that “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) In the instant case, since applicant claims (claim 1) and discloses in the specification that the same product can be made by two methods, one of which is the method taught by Brake, wherein a premix comprising water, fat, non fat milk solids and sweetener is homogenized and pasteurized, cooled, and then mixed with a fruit puree, the instantly claimed product recited in claim 23 which is made by adjusting the pH of the fruit puree to a value above the isoelectric point of any protein to be incorporated in the product, followed by producing a premix comprising fat, non-fat milk solids, sweetener, and about 5-80% of the fruit puree, and then homogenizing and pasteurizing the premix would be the same as the product taught by Brake.

### ***Response to Arguments***

Applicant's arguments with respect to the 102 and 103 rejections have been fully considered but they are not persuasive.

Applicant argues that the references of record do not teach of the iso-electric point of the proteins, the processing steps in a particular method, and thus do not teach the instantly claimed properties of the product including resistance to meltdown, serum leakage, and meltdown initiation time. Applicant's argument is not convincing. First it is noted that in the process limitations recited in claim 1, modification of the iso-electric point of the proteins is an optional limitation. Furthermore, Applicant is reminded that “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-

process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” In *re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) In the instant case, since applicant claims (claim 1) and discloses in the specification that the same product with the same properties can be made by two methods, one of which is the method taught by Brake and/or Koss, wherein a premix comprising water, fat, non fat milk solids and sweetener is homogenized and pasteurized, cooled, and then mixed with a fruit puree, the instantly claimed product which is made by adjusting the pH of the fruit puree to a value above the isoelectric point of any protein to be incorporated in the product, followed by producing a premix comprising fat, non-fat milk solids, sweetener, and about 5-80% of the fruit puree, and then homogenizing and pasteurizing the premix would be the same, including possessing the same properties, as the product taught by Brake and/or Koss.

Applicant argues that Koss does not teach of optional emulsifiers and stabilizers. Applicant’s argument is not convincing as Koss teaches that the composition contains optional stabilizers and emulsifiers thus teaching that the composition can include no additional stabilizers and/or emulsifiers (page 9 lines 11-13 and page 21 lines 1-3).

Applicant argues that Brake teaches that stabilizers are required thus the reference does not meet and cannot be used for the claimed limitations which require no additional stabilizers and to remove the stabilizers from the combination of Brake would be to pick and chose from the references. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986) and the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Arbuckle teaches that stabilizers and emulsifiers are generally

included in frozen confections, however, many excellent frozen confections are made without additional stabilizers and emulsifiers, such as when milk and milk products, which naturally contain stabilizers and emulsifiers, are included in the confections (page 96); Brake teaches of adding about 0.2-1.5% stabilizers, 0-10% non fat milk solids, and 0-5% milk fat; thus it would have been obvious to one of ordinary skill in the art at the time the invention was made to not include additional stabilizers if the stabilizers were inherently included in the other compositional ingredients, such as the 0-10% nonfat milk solids or 0-5% milk fat, as taught by Arbuckle. To do so would be saving money in processing through the incorporation of desired components through other functional ingredients.

Applicant argues that Brake does not teach of a composition with specific overrun and pH as instantly claimed. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986) and the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Jones teaches that pH of frozen desserts with fruits must be adjusted within the appropriate range; that a pH which is too high results in an unset food which remains liquid after processing; that a pH which is too low results in a product which can separate; that a pH in a frozen fruit product is less than about 4.5 (Column 2 lines 47-68); and an overrun 18-100 in a frozen fruit dessert (Column 2 lines 47-53) which is adjusted depending on the desired form and hardness of the final product (Column 3 lines 12-28). It would have been obvious to one of ordinary skill in the art at the time the invention was made to aerate the frozen product to a specific amount of aeration between 18 and 100 depending on the final form and hardness of the final product, as taught by Jones and it would have been obvious to one of ordinary

skill in the art at the time the invention was made to adjust the pH of the frozen composition to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught by Jones. To do so would be within the ordinary skill and ingenuity of one of ordinary skill in the art and would not impart a patentable distinction to the claims.

Applicant notes, remarks pages 11 of 17, that the previous 103 rejection over a combination of Koss and Brake was previously withdrawn in an office action mailed January 9, 2008. Applicant's statement is incorrect. The 103 rejection withdrawn in January 9, 2008 was with a combination of Koss and Blake (US 4244981) and not Koss and Brake (US 6432466).

In response to applicant's argument that Jonas cannot be combined with Brake because Jonas does not teach of dairy in the frozen dessert and that to do so would be picking and choosing from the references, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, both references teach of frozen confectionaries and the knowledge of the prior art, i.e. Jonas, supports modifying the reference of Brake. Specifically, Jonas teaches that a pH of about 4.5 forms a final product which does not remain liquid or separate after processing as taught by Jones. Thus, one would have been motivated to adjust the pH of the frozen composition to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught by Brake in view of Jones.



***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/  
Primary Examiner  
Art Unit 1794

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Art Unit 1794

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